



No. 226

U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

REPUBLIC AVIATION CORPORATION,

Petitioner

NATIONAL LABOR RELATIONS BOARD,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

J. EDWARD LUMBAR, JR.

JOHN J. RYAN,

FREDERICK M. DAVENPORT, JR.

Attorneys for Petitioner

DONOVAN, LEISURE, NEWTON & LUMBAR,

Of Counsel.



INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	7
I. The decision below is in conflict with decisions of other circuit courts of appeals	7
II. The decision below departs from the established principles of judicial review under the Act	8
Conclusion	12
Appendix	13
 CITATIONS	
Cases:	
<i>Boeing Airplane Co. v. National Labor Relations Board</i> , 140 F. (2d) 23 (C. C. A. 10)	8
<i>Carter Carburetor Corp. v. National Labor Relations Board</i> , 140 F. (2d) 714, (C. C. A. 8)	8

<i>By Tourman Co. of Georgia v. National Labor Relations Board</i> , decided June 23, 1944 (C. C. A. 5)	8
<i>Midland Steel Products Co. v. National Labor Relations Board</i> , 113 F. (2d) 800 (C. C. A. 6)	7, 8, 11n
<i>National Labor Relations Board v. Denver Tent & Awning Co.</i> , 138 F. (2d) 410 (C. C. A. 10)	8
<i>National Labor Relations Board v. Jones & Laughlin Steel Corp.</i> , 301 U. S. 1	13n
<i>National Labor Relations Board v. Link-Belt Co.</i> , 311 U. S. 584	11
<i>National Labor Relations Board v. Waterman Steamship Corp.</i> , 309 U. S. 206	10
<i>National Labor Relations Board v. Williamson-Dickie Mfg. Co.</i> , 130 F. (2d) 260 (C. C. A. 5)	7, 8

Statute:

<i>National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 <i>et seq.</i>)</i>	2, 10, 13
---	-----------

IN THE

**Supreme Court of the United States,
OCTOBER TERM, 1944**

No.

REPUBLIC AVIATION CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT**

Republic Aviation Corporation, a Delaware corporation, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered April 6, 1944, (R. 716-718), denying petitioner's petition to review and set aside an order issued by the National Labor Relations Board against the petitioner and enforcing said order in full.

Opinions Below

The opinion of the Circuit Court of Appeals (R. 710-715) is reported in 142 Fed. (2d) 193. The decision and order of the Board (R. 673-679) are reported in 51 N.L.R.B. 1186.

Jurisdiction

The decree of the Circuit Court of Appeals (R. 716-718) was entered on April 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

Questions Presented

1. Petitioner promulgated a rule prohibiting solicitation of any type in its factory or offices. The sole purpose of the rule was to promote employee efficiency and harmony, and it was enforced impartially without animus against unions, general or particular. The question is whether the Board erred in finding that petitioner violated Section 8(1) and (3) of the National Labor Relations Act by applying the rule to prevent solicitation in its plant for union membership during the employees' non-working time.
2. No union having been recognized at its plant, petitioner forbade its employees to wear union "shop steward" buttons while at work. The question is whether the Board erred in finding that petitioner violated Section 8(1) and (3) of the Act by adopting and enforcing this prohibition.

Statute Involved

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

1. A third question before the court below was whether substantial evidence supported the Board's finding that petitioner violated Section 8(1) of the Act through activities of three supervisory employees. The court found it "unnecessary to decide" this question (R. 714) on the ground that its holding on the first two issues justified enforcement of the Board's order. Petitioner contends that the court's decision of the first two questions was erroneous, and that it should have passed upon the third question.

Statement

After the usual proceedings under Section 10 of the Act, the Board issued its decision and order dated August 11, 1943 (R. 673-679).

The Facts.—The pertinent facts, as shown by the evidence may be summarized as follows:²

Petitioner's published rule, "Soliciting of any type cannot be permitted in the factory or offices," was adopted more than a year and a half before the commencement of any union activity in the plant (R. 38-39, 41, 60, 204-205). With a rapidly expanding force engaged in vital war production (R. 541),³ petitioner found it necessary—in the interests of efficiency and harmony—to prevent personal harassment of the employees by solicitors for a host of organizations and causes (R. 42-47, 53-56, 58, 446-452, 461-462). The no-solicitation rule applied to both working and non-working time and was enforced impartially in all cases to the best of petitioner's ability⁴ (R. 30-31, 36-38, 42-45, 48-49, 54-58, 63-64, 446-452, 455-456, 460-463, 472-473, 498-500).

On January 20, 1943, petitioner discharged an employee, Stone, for soliciting (during the lunch period) memberships in International Union, United Automobile Aircraft & Agricultural Implement Workers of America, U. A. W. C. I. O. (hereafter called the U. A. W.) (R. 56, 74, 291). Although Stone had been warned for a previous violation of the solicitation rule, he had insisted that he would continue to disobey it (R. 88-90, 288-284).

2. Reference is omitted to the facts concerning the allegedly unlawful activities of three supervisory employees. As already noted, the court below did not review the Board's findings in this respect.
3. Petitioner is exclusively occupied in producing military aircraft (the P-47 Thunderbolt) for the United States Army Air Corps (R. 48).
4. The rule did not bar full and free employee discussion on all subjects, including unions and their affairs (R. 556, 560, 563).

About mid-January of 1943, four employees began to wear U. A. W. "shop steward" buttons in petitioner's plant (R. 163, 113, 154, 183, 237). At that time the U. A. W. had chartered no local at the plant, nor had it sought recognition as employee bargaining representative (R. 158, 555). After careful study of the matter with counsel, petitioner's top management concluded that petitioner could not properly ignore or acquiesce in the wearing of the buttons, since the practice (1) was a misrepresentation of the wearers' true status in the plant, (2) might well be held to constitute illegal assistance to the U. A. W. as against rival unions, and (3) threatened interference with the operation of petitioner's established grievance procedure (R. 551-555). Petitioner fully discussed with the four employees the reasons for its decision to ban the "shop steward" badges, and warned them that violation of the ban would result in discharge (R. 556-565). Three of the four employees nevertheless persisted in wearing the buttons, and were consequently dismissed (R. 123, 198, 242).

The Board's Findings and Order—The Board found in effect that the solicitation rule had not been discriminatorily applied to Stone (R. 675), but that the promulgation of the rule and its enforcement outside of working time was "in the absence of special circumstances" *per se* a violation of Section 8(1) and (3) of the Act (R. 674-675).

The Board also found in substance that petitioner's ban against steward buttons did not result from any animus against the U. A. W. (R. 676), but that it did curtail "the right of employees to wear union insignia at work" as a "reasonable and legitimate form of union activity", and therefore violated the Act (R. 675-676).

5. Petitioner made clear that it did not object to the wearing of any other type of union button (R. 561-563).
6. The Board also found that the activities of three supervisory employees constituted a violation of Section 8(1) of the Act (R. 677).

The Board's order *inter alia* required reinstatement with back pay for Stone and the three other discharged employees, and the rescission of the solicitation rule "insofar as it prohibits union activity and solicitation on company property during the employee's own time" (R. 677-679).

Thereafter petitioner petitioned the court below to review and set aside the Board's order (R. 680-687). The Board answered, requesting enforcement of its order (R. 695-700).

Decision of the court below—The court recognized that the question of the solicitation rule came to it "stark and bare", uncomplicated by any anti-union animus (R. 710-711); and it found that the question comprised two parts: (1) of fact, as to the prejudice to the employer and the benefit to the employees in permitting union solicitation during non-working time, and, conversely, the respective benefit and prejudice in forbidding it, and (2) of law, "whether the benefit shall prevail over the prejudice, or vice versa" (R. 712). Deeming it to be the Board's function to determine the fact part of the question, the court further held that, although the Board had made no specific findings as to the respective benefit and prejudice either in the case at bar or in other cases involving the question, the Board could nevertheless "draw upon its general acquaintance in dealing with such conditions", and, in the absence of specific evidence adduced by the employer, decide both the fact and law parts of the question (R. 712-713). The court concluded that it could not review the Board's determination of the law question (R. 713).

With respect to the prohibition against the wearing of steward buttons, the court appears to have held the reasonableness of this prohibition to be a question wholly within the Board's province (R. 714).

The Court sustained the Board's order in full, without passing upon the question whether the activities of three supervisory employees violated the Act (R. 714).

Judge Swan, dissenting on the issue of the solicitation rule, held in effect that the burden was upon the Board to show why the rule was unreasonable as applied particularly to petitioner's plant, and that, since the Board had made no such findings, the rule should be held valid (R. 714-715).

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

1. In failing to hold that petitioner's solicitation rule was valid, and that application of the rule to union solicitation in the plant during non-working time did not constitute a violation of the Act.
2. In holding that it was without power to review the Board's determination of the question of law as to the reasonableness of the solicitation rule.
3. In failing to hold that petitioner's prohibition of the wearing of union steward buttons in its plant was valid.
4. In holding, in effect, that it was without power to review the Board's determination of the question of law as to the reasonableness of the prohibition of the wearing of steward buttons.⁷
7. Petitioner also urges, of course, that the court should have decided whether there was substantial evidence to support the Board's finding that the activities of the three supervisory employees violated Section 8(1) of the Act (see f.n. 1, p. 2, *supra*).

REASONS FOR GRANTING THE WRIT

I

The decision below is in conflict with decisions of other Circuit Courts of Appeals.

With respect to the solicitation rule, the court below stated the question to be

whether the Board has power to forbid an employer, who has promulgated a rule, generally forbidding solicitation of any kind in his plant, to apply it to prevent electioneering for a union during the lunch hour. (R. 710).

The court further noted that the question came to it

stark and bare; whether the Board may declare that the enforcement of the rule *without any animus against unions, general or particular*, may be an "unfair labor practice" (R. 710-711). [Italics supplied].

The court answered the question in the affirmative.

In this respect, the holding below is squarely in conflict with decisions of the Fifth and Sixth Circuit Courts of Appeals; and the principles of these decisions have been endorsed by the Eighth and Tenth Circuits in three very recent cases.

In *Midland Steel Products Co. v. National Labor Relations Board*; 113 F.(2d) 800, 805, 806 (1940), the Sixth Circuit expressly sustained the validity of the same type of solicitation rule as presented in the instant case. In *National Labor Relations Board v. Williamson-Dickie Mfg. Co.*, 130 F. (2d) 260, 267, 268 (1942), the Fifth Circuit by necessary implication upheld the validity of such a rule, as the court below recognized (R. 711); and in *LeTourneau Co. of Georgia v. National Labor Relations Board*, decided June 23, 1944, the Fifth Circuit squarely affirmed an em-

ployer's right to enforce a similar rule, which (as in the instant case) was not designed to impede union organization and not discriminatory applied.

This question has lately been considered by the Tenth Circuit in *National Labor Relations Board v. Denver Tent & Awning Co.*, 138 F. (2d) 419, 441 (1943), and *Boeing Airplane Co. v. National Labor Relations Board*, 140 F. (2d) 423, 435 (1944), and by the Eighth Circuit in *Carter Carburetor Corp. v. National Labor Relations Board*, 140 F. (2d) 714, 716 (1944). All three decisions, citing the *Midland Steel* and *Williamson-Dickie* cases with approval, subscribe to the general proposition that such a rule as here involved, if adopted and applied without hostility to unions, is valid.

As Judge Swan noted in his dissenting opinion (R. 715), "all the judges who have previously considered such a rule, appear to have thought it also reasonable when applied to non-working hours."

Further, the decision below, insofar as it misclaims power to consider the question of law concerning the solicitation rule, is plainly in conflict with the *Midland Steel* case, 143 F. (2d) 800 (C. C. A. 6), where the court held (p. 805):

Whether this rule was reasonable is a question of law for the court to determine. (Cases cited).

II

The decision below departs from the established principles of judicial review under the Act.

The court below recognized that the question of the validity of the solicitation rule

is what is often called a "mixed question of law and fact"; and it is true that it comprises, or should comprise, two quite different determinations: (1) what in fact will be the prejudice to the

interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it; (2) whether the benefit shall prevail over the prejudice, or vice versa. (R. 712).

The first determination, according to the court, being an ascertaining of facts, was properly for the Board; the second determination, being one of law, was subject to court review. The court then pointed out that the Board had not made any specific findings, either in the case at bar or in other cases involving this issue, as to the respective benefit and prejudice to employer and employees in allowing or forbidding union solicitation during non-working hours. But, said the court, in effect, such specific findings are not necessary: in dealing with the problem, the Board "may draw upon its general acquaintance" with conditions in industry (R. 713). The court next indicated that the burden is upon the employer to show "the results [as presumably, of non-working-time solicitation] in his specific case" (R. 713). The court then concludes

On this record, we are certainly not called upon, nor should indeed be justified, to consider the question of law; i.e., the priority to be awarded between the conflicting interests, which lies enmeshed in the mixed question that is involved. (R. 713).

It is clear that in this case the court, after paying lip-service to its duty to review the conceded question of law, has proceeded wholly to evade that duty on the asserted grounds (1) that the Board failed to make findings sufficient to enable the court to distinguish the law question, and (2) that the Board may lay down a general principle based upon its "acquaintance with the subject matter" which, in the absence of specific evidence to the contrary

—settles both question of fact and question of law.⁸ Even assuming *arguendo* that the court must (as the majority opinion suggests, R. 713) give “presumptive validity” to the Board’s decision where a legal question is clearly presented by specific findings of fact, there is surely no warrant for the court’s unequivocal acceptance of a general legal conclusion made by the Board without reference to any discernible fact-findings.

The effect of the court’s decision is thus to abdicate its traditional right of review, and to confer upon the Board power finally to determine questions of law by its *ipse dixit*, without a shred of evidentiary support. Such an abdication is contrary to the intent of Section 10 (e) and (f) of the Act, and is a wide departure from the established principles of judicial review thereunder. As this Court said in *National Labor Relations Board v. Waterman Steamship Corp.*, 309 U. S. 206 (1940) at 208—

As it did in setting up other administrative bodies, Congress has left questions of law which arise

8. The untenable character of the Board’s contention (which the court sustained) that the employer must show “special circumstances” to justify this type of rule is well demonstrated in Judge Swan’s dissent (R. 714-715). After pointing out the inherent and obvious dangers in permitting union solicitation during the lunch hour, Judge Swan observed that the Board had neither advanced any counter-arguments, nor found that off-premises solicitation would be so difficult as to make unreasonable the application of the rule in petitioner’s plant. The dissenting opinion continues (R. 715)—

In the absence of some special circumstance I think the rule should be held valid. The Board, however, by its *ipse dixit* and without stating reasons seems to have inverted the process and to require the employer to show special circumstances to justify the rule. My colleagues think this is within the Board’s exclusive province. I cannot agree, for I am unable to see why the Board is supposed to have more competence than the courts to pass upon the reasonableness of the rule in the absence of evidence tending to show that it unduly interferes with the employees’ right to form, join or assist labor organizations.

before the Board—but not more—ultimately to the traditional review of the judiciary.

See also *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 597 (1941).

The lower court summarily dismissed the question of the prohibition against stewards' buttons, merely pointing out that the Board had not been impressed with certain of petitioner's reasons for adopting the prohibition. Here the court fell into the same error as in the case of the solicitation rule: it was either unable or unwilling to see that the same fundamental question of law underlay both issues, to wit, the reasonableness of petitioner's regulation of the conduct of its business.⁹ In both situations, the court's

9. That the Board may not interfere with an employer's right to discharge employees for other than anti-union reasons, has been clearly stated by this Court. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), Chief Justice Hughes, speaking for the majority of the Court, said (pp. 45-46):

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to invoke its authority as a protest for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. [Italics supplied].

Similarly, the Sixth Circuit has held in *Midland Steel Products Co. v. National Labor Relations Board*, 113 F. (2d) 800 at p. 805:

The employer in his right of control over the property and the employee is authorized to make reasonable rules for the conduct of the business; and the employee is bound to obey such reasonable rules as a part of his contract of hire.

refusal to accord petitioner its statutory right to a review raises an important question in the administration of the Act, which should be passed upon by this Court.

Conclusion

The decision of the court below conflicts on important questions with decisions of other circuit courts of appeals. In addition, the decision below represents a wide departure from the established principles governing review of orders of the Board, and thus raises an important public question.

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

J. EDWARD LUMBARD, JR.,

JOHN J. RYAN,

FREDERICK M. DAVENPORT, JR.,

Attorneys for Petitioner.

DONOVAN LEISURE NEWTON & LUMBARD,

Of Counsel.

July 1, 1944.

Appendix

National Labor Relations Act (Act of July 5, 1935, e. 372, 49 Stat. 449, 29 U. S. C., See, 451 *et seq.*):

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

SEC. 10(e). The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in session, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the

14

findings and order of the Board. *** The findings of the Board as to the facts, if supported by evidence, shall be conclusive. *** The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. *** Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

